IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

NOTICE OF MOTION NO.63 OF 2005

IN

SUIT NO.55 OF 1997

IN

PETITION NO.397 OF 1997

Smt.Kishorekanti Beharilal Khandelwal
alias Smt.Kishorekanti Atolia
alias Smt.K.K.Khandelwal. ...Deceased

Shri.Rajeev Ashokkumar Khandelwal. ...
Petitioner/plaintiff.

vs.

Smt.Ashalat Premraj Gupta. ...
Caveatrix/Defendant.

Mr.Bhandary i/b. M/s.Bhandary & Bhandary for petitioner.

Mr.K.H.Mody i/b. M/s.J.M.B.Partners, for Defendant.

CORAM: D.K.DESHMUKH,J.

DATED: 12th October,2006

P.C.:-

1. This is a notice of motion taken out by the defendant for

stay of the suit. The admitted facts are that (i) the present suit has been filed by the plaintiff propounding the Will left behind by Smt.Kishorekanti Khandelwal. (ii) that the defendant has filed the petition for probate of the Will also alleged to have been left behind by the same deceased person Smt. Kishore-kanti Beharilal Khandelwal. (iii) that the suit in Delhi Court has been filed earlier in point of time to this suit. (iv) that though there are some additional parties joined in the Delhi Suit, the plaintiff and the defendant are parties to the suit in Delhi Court.

2. The learned Counsel appearing for defendant submits that the matter in issue in both the suits are same. According to the learned Counsel for the defendant before deciding whether to grant probate in favour of the defendant in his suit that Court will have to decide the question whether that is a last will left behind by the deceased. The same question will have to be decided by this Court before granting probate of the Will propounded by the plaintiff in the present suit. For deciding this question, the Will propounded by the plaintiff and the defendant will have to be considered by the Court. Therefore, the subject matter which is direct and substantial issue in both the courts, is the same. The learned Counsel submits that in Delhi suit there are some additional parties joined. The learned Counsel relying on the judgment of the Division Bench of Calcutta High Court in the Case

“Arun General Industries Ltd. Vs. Rishabh Manufacturers Private Ltd. & others, AIR 1972 Calcutta 128 (V 59 C 22)”, submits that it is not necessary that parties to both the suit should be identical. If the parties to both the suits are substantially the same then section 10 of Civil Procedure Code operates. The learned Counsel appearing for plaintiff firstly submits that issue in both the suits are different. Though the plaintiff and defendant are parties to both the suits, some additional parties are joined to Delhi Suit therefore, according to the learned Counsel, Section 10 does not operate.

3. The issue which will have to be decided by the Probate Court before granting the probate of the Will propounded in that petition will be "whether it is a last Will left behind by the deceased". That question will have to be decided by the Delhi Court. The present plaintiff has filed a caveat there. Obviously the plaintiff would contend that the Will which is the basis of the present suit is the last Will of the deceased. Therefore, the Delhi Court will have to decide the question whether the Will propounded by the present plaintiff or the Will propounded by the defendant in the Delhi Court is the last Will of the deceased or not ? Incidentally, the Court will also have to consider whether if the Will propounded by the plaintiff in the present suit is a last Will whether it is a valid Will ? Therefore, the questions in issue in both the suits are substantially the same. For operation of the doctrine

of sub-judice which is incorporated in Section 10 of C.P.C. it is not necessary that the parties to the two suits should be identical. Parties should be substantially the same. Merely because the some persons who may be proper parties are joined to one suit whereas they are not joined to the other suit, it does not prevent operation of Section 10 of C.P.C.or doctrine of sub-judice. Perusal of the judgment of the Division bench of the Calcutta High Court in “Arun General Industries Ltd.” case shows that the Calcutta High Court has relied on the Division bench judgment of this Court i.e. "AIR 1920 Bombay 296" for arriving at the conclusion that Section 10 of the Civil Procedure Code requires substantial identity in the matter of the parties.

4. The learned Counsel appearing for defendant also relied on the judgment of the Division Bench of this Court in the case “Jai Hind Iron Mart Vs. Tulsir Bhagwandas, AIR 1953 Bombay 117 (Vo.40) which says the same thing. Therefore, merely because some of the beneficiaries have been joined as parties to the suit in Delhi Court, it cannot be said that the parties to the Delhi suit are not substantially the same. Looking from any point of view, therefore, as admittedly the Delhi suit has been filed earlier, the proceeding in the suit pending in this Court will have to be stayed till the suit in Delhi Court is decided. Notice of motion is granted in terms of prayer clause (a). Notice of motion is disposed of.